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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 316.

BEN F. WRIGHT, Auditor for the Philippine Islands,
Petitioner,

vs.

YNCHAUSTI & COMPANY, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR RESPONDENT.

F. W. CLEMENTS,
LAWRENCE H. CAKE,
Counsel for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

The issue in this case is a narrow one. It is the question of law whether the Insular Auditor has any power or authority, derived from the act of August 29, 1916, c. 416, 38 Stat. 545, to review the action of the Collector of Customs, under the Tariff Act of August 5, 1909,

c. 8, 36 Stat. 130, in deciding the right of the respondent to a refund of customs duties paid under protest and in drawing a warrant on unappropriated money in the treasury to pay such refund.

The proceedings were begun January 19, 1925, when Ynchausti & Company filed in the Supreme Court of the Philippine Islands a petition for a writ of mandamus to be directed to Ben F. Wright, Insular Auditor, to require him to countersign a warrant for 159,960 pesos drawn by the Insular Collector of Customs in favor of the petitioner (respondent here). (R. 2-5) The Insular Auditor filed an answer to which the petitioner (respondent here) demurred on the ground that the facts stated therein were not sufficient to constitute a defense. (R. 12-18) The Supreme Court of the Philippine Islands, after hearing argument and reargument, ordered that the writ issue as prayed. (R. 61-85) A motion for reconsideration was denied and final judgment was entered October 6, 1925. (R. 131, 132-133)

This Court granted a writ of certiorari, April 26, 1926, on the petition of the Auditor.

The following is a short statement of the material facts:

In 1924, Ynchausti & Co., agent and operator of the steamship Venus, a vessel engaged in the coastwise trade in the Philippine Islands, caused certain heavy repairs and construction work to be done at Hongkong.

The Philippine Tariff Act of 1909, hereinafter referred to, provided that a duty should be imposed on the cost of such repairs made in foreign countries unless it was made to appear "upon proof satisfactory to the collector of customs that adequate facilities are not afforded in the Philippine Islands for such repairs,

so that the work can not be done there reasonably economically and within a reasonable time, in the judgment of said collector."

When the vessel arrived in Philippine waters the Insular Collector of Customs assessed a customs duty of 159,960 pesos on account of the repair work done at Hongkong, which was paid to him by Ynchausti & Co. under protest, the protest being on the ground that the repairs were free from duty under the law.

Thereafter, the Insular Collector of Customs, after a hearing, rendered a decision sustaining the protest and ordered a refund of the money paid. All the requirements of law—the Tariff Act of 1909, and the Administrative Code, 1917—were fully complied with and copies of the Collector's decision were sent to the Secretary of Finance and the Insular Auditor. No appeal from the Collector's decision was taken to the Court of First Instance, as authorized by law, although the Insular Auditor did request and urge that such an appeal be taken.

After the time for an appeal had expired, a warrant was drawn by the Collector in favor of Ynchausti & Co. for 159,960 pesos, the amount of the duty found to have been wrongly assessed and collected. Upon presentation of the warrant to the Insular Auditor for his counter-signature, as provided in section 621 of the Administrative Code, he refused to countersign it. At the time the petition for a writ of mandamus was filed he still persisted in his refusal to countersign the warrant.

POINTS OF LAW.

I.

THE COLLECTOR OF CUSTOMS IS INVESTED WITH (A) EXCLUSIVE JURISDICTION AND AUTHORITY, SUBJECT ONLY TO AN APPEAL TO THE COURT OF FIRST INSTANCE AS PROVIDED BY LAW, TO DETERMINE THE DUTIABILITY OF REPAIRS MADE ABROAD ON VESSELS OF PHILIPPINE REGISTRY; (B) AUTHORITY TO DETERMINE THE RIGHT OF A PROTESTANT TO A REFUND OF SUCH DUTIES PAID UNDER PROTEST; AND (C) AUTHORITY TO DRAW A WARRANT ON UNAPPROPRIATED MONEY IN THE TREASURY IN PAYMENT OF ANY SUCH REFUND FINALLY DETERMINED TO BE DUE.

The Philippine Tariff Act of 1909—Act August 5, 1909, c. 8, 36 Stat. 130—as originally enacted contained the following:

> "Sec. 8. That the rates of duty to be collected on articles, goods, wares, or merchandise imported into the Philippine Islands, or going into said islands from the United States or any of its possessions except as otherwise provided in this Act, shall be as follows:
>
> * * * * * * *
>
> '200. Boats, launches, lighters, and other water craft, set up or knocked down, imported into the Philippine Islands, *and cost of repairs made in foreign countries to vessels, or to parts thereof, documented for the Philippine coastwise trade or plying exclusively in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands,* fifty per centum ad valorem.
>
> '*Provided*, That *upon proof satisfactory to the collector of customs that adequate facilities are*

not afforded in the Philippine Islands for such repairs, the same shall be subject to the provisions of paragraph three hundred and forty-eight of this Act; and

'*Provided further*, That if the owner or master of such vessel shall furnish evidence satisfactory to the collector of customs that such vessel while in the regular course of her voyage was compelled by stress of weather or other casualty to put into a foreign port or place and make such repairs to secure the safety of the vessel or to enable her to return to the Philippine Islands, such duty shall not be imposed; and

'*Provided further*, That furnishings, stores and supplies, not otherwise provided for, purchased abroad and imported in such vessels shall be dutiable under the corresponding paragraphs of this Act.

The expression 'imported into the Philippine Islands,' shall be held to mean 'brought into the jurisdictional waters of the Philippine Islands, in or on another vessel, or towed therein by another vessel (except when becalmed or disabled at sea), as distinguished from coming into said islands under the craft's own steam, sail or other motive power.' * * *

"Sec. 11. That the following articles shall be free of duty upon the importation thereof into the Philippine Islands upon compliance with regulations which shall be prescribed in accord with the provisions of each paragraph:

* * * * * * *

'348. Repairs to vessels documented in the Philippine Islands or regularly plying in Philippine waters, made in foreign countries, *upon proof satisfactory to the collector of customs that adequate facilities for such repairs are not afforded in the Philippine Islands.*' "

In 1919 the Philippine Legislature, acting under the authority conferred by section 10 of the Organic Act (Act August 29, 1916, ch. 416, 39 Stat., 545), amended paragraph 200 to read as follows:

> "200. Boats, launches, lighters, and other craft, set up or knocked down, imported into the Philippine Islands, and cost of repairs made in foreign countries to vessels, or to parts thereof, documented for the Philippine coastwise trade and plying usually in Philippine waters and for which repairs adequate facilities are afforded in the Philippine Islands, fifty per centum ad valorem until December thirty-first, nineteen hundred and twenty-four; twenty-five per centum ad valorum on and after January first, nineteen hundred and twenty-five.
>
> "Provided, That upon proof satisfactory to the collector of customs that adequate facilities are not afforded in the Philippine Islands for such repairs, *so that the work can not be done there reasonably economically and within a reasonable time, in the judgment of said collector,* such repairs shall be subject to the provisions of paragraph three hundred and forty-eight of this Act." etc.[1]

The Administrative Code, 1917—Act No. 2711, Philippine Legislature, approved March 10, 1917—contains the following provisions:

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[1] The effect of the amendment was to add to the proviso the words "so that the work can not be done there reasonably economically and within a reasonable time, in the judgment of said collector." The amendment was occasioned by a decision of the Supreme Court of the Philippine Islands in a case in which it was shown that there were adequate facilities in the Philippine Islands for making and installing all the needed repairs and parts except the manufacture of a tail shaft which would have to be brought in from abroad, the court holding that such repairs if done in a foreign port would be subject to duty. *Gutierrez Hermanos v. Insular Collector of Customs*, 39 Phil. Rep. 876. This decision it was feared might lead to restrictive administrative interpretation and consequently the Legislature amended paragraph 200 as shown above.

"Chapter 39.—Bureau of Customs."

* * * * * * *

"Sec. 1301. *Claim for refund and mode of payment.*—All claims for refund of duties shall be made in writing, and forwarded to the collector of customs to whom such duties were paid; and upon receipt of claims for refund, collectors of customs will verify the same by the records of their office, and if found to be correct and in accordance with law, will certify the same to the Insular Collector with their recommendations in the case, together with all necessary papers and documents. Upon receipt by the Insular Collector of any claim for refund so forwarded, he shall draw a warrant in payment and settlement thereof, if found correct."

* * * * * * *

"Sec. 1369. *Authority of Insular Collector to make compromises.*—The Insular Collector of Customs may compromise any case or proceeding arising under the customs laws and may refund money erroneously or illegally received, or fines imposed without authority."

With respect to the drawing of warrants in payment of refunds, in addition to the provision in section 1301, *supra,* it is provided in

"Chapter 26—Bureau of Audits"

* * * * * * *

"Sec. 616. *Persons authorized to draw warrants for payment of Insular funds.*—Warrants upon the Insular Treasury shall be drawn by the chief of Bureau or Office having control of the appropriation or fund against which such war-

rants are chargeable or by such subordinate as shall be designated for such duty by the proper Department head.

"Warrants chargeable to Insular appropriations or funds not under the control of a Bureau or Office shall be drawn by such officer as shall be specified by law or, in the absence of such, designated by the Governor-General."

* * * * * * *

"Sec. 621. *Countersigning of warrants by Auditor.*—No Insular warrant shall be paid by the Treasurer until countersigned by the Auditor or by an officer of the Bureau of Audits thereunto authorized in writing by him."

There was and is a permanent and continuous appropriation available for the payment of customs refunds, provided by Act No. 357 as amended by Act No. 1515. This is admitted by the Auditor's answer (R. 14), as pointed out in the opinion of the court below (R. 84).

II.

THE AUDITOR HAS NO POWER TO REVIEW THE DECISION OF THE COLLECTOR OF CUSTOMS AS TO THE DUTIABILITY OF SUCH REPAIRS OR THE RIGHT OF A PROTESTANT TO A REFUND BASED THEREON.

The Insular Auditor derives his power from the Organic Act—Act August 29, 1916, c. 416, 39 Stat. 545—the purpose of which was "to declare the purpose of the people of the United States as to the future political status of the people of the Philippine Islands, and to provide a more autonomous government for those islands."

If the Insular Auditor has any power to review the decision of the Insular Collector of Customs, or any

discretionary or quasi-judiciai duty to perform in such a case as this, it must be found in section 24 of that Act, which provides:

> "Sec. 24. That there shall be appointed by the President an auditor,who shall examine, audit, and settle all accounts pertaining to the revenues and receipts from whatever sources of the Philippine government and of the provincial and municipal governments of the Philippines, including trust funds and funds derived from bond issues; and audit, in accordance with law and administrative regulations, all expenditures of funds or property pertaining to or held in trust by the government or the Provinces or municipalities thereof. He shall perform a like duty with respect to all government branches.
>
> He shall keep the general accounts of the government and preserve the vouchers pertaining thereto.
>
> It shall be the duty of the auditor to bring to the attention of the proper administrative officer expenditures of funds or property which, in his opinion, are irregular, unnecessary, excessive, or extravagant.
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> * * * * * * *
>
> "The administrative jurisdiction of the auditor over accounts, whether of funds or property, and all vouchers and records pertaining thereto, shall be exclusive."
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> * * * * * * *
>
> "The decisions of the auditor shall be final and conclusive upon the executive branches of the government, except that appeal therefrom may be taken by the party aggrieved or the head of the

> department concerned within one year, in the manner hereinafter prescribed. The auditor shall, except as hereinafter provided, have like authority as that conferred by law upon the several auditors of the United States and the Comptroller of the United States Treasury and is authorized to communicate directly with any person having claims before him for settlement, or with any department, officer, or person having official relations with his office."

The Insular Auditor contends that by that section he is vested with exclusive jurisdiction and authority to determine whether "any claim" for the payment of money (including a claim as in this case for the refund of money paid to the Insular Collector of Customs under protest and later found and determined by that officer, acting under the Tariff Act of 1909 as amended, to have been wrongly collected) shall be recognized and paid, and that his duty is discretionary and quasi-judicial notwithstanding the express language of section 8, paragraph 200, and section 11, paragraph 348 of the Tariff Act of 1909 as amended.

He also contends that it was his duty to determine whether the refund could be paid from the general appropriation, that is, "whether the refund ordered by the collector was of customs duties *erroneously* and *illegally* collected." Italics are used by counsel for the Auditor in their brief filed herein, page 4.

The argument overlooks the fact that the Tariff Act of 1909 in express words imposes on the Collector of Customs the duty to decide, subject to an appeal as provided by law, whether such duties are erroneously and illegally collected. How can the Auditor claim the right to decide that question—whether duties are erroneously and illegally collected—in the face of the ex-

press words of the Tariff Act? His argument for a general power of review over all administrative officers in all cases which involve the payment of money, and a general power to determine in any case the availability of an appropriation, is unsound *as applied to this case* because at every turn the argument runs into the express words of the Tariff Act which confer jurisdiction on the Collector of Customs to decide this particular question (the dutiability of repairs). To carry out the Collector's decision, which became final upon the failure of the Bureau of Finance to take an appeal to the Court of First Instance, nothing remains to be done but the ministerial act of drawing and countersigning a warrant conformable to the Collectors decision.

The elaborate and learned argument presented in the brief of counsel for the Auditor has no application to this case. From first to last they ignore and disregard the statute which is of vital importance—the Tariff Act of 1909. In their entire brief the Tariff Act of 1909 is mentioned only twice (pages 2 and 3) and then only casually in the statement of the case.

So far as this case is concerned, the Auditor's contention may be narrowed down to a claim of a general power of review of the Collector's decision upon the ultimate question of *fact* on which the right to a refund must depend. That he has no such power of review and that the Collectors finding of fact, that there were no adequate facilities in the Philippine Islands for the repairs in question (R. 19-20) is final and conclusive in the absence of an appeal to the court of first instance, is plain.

It has been repeatedly held that where such discretion is vested in an administrative officer the de-

cisions of that officer with respect to such matters are conclusive and binding on the accounting officers.

United States vs. Jones, 18 How. 92.
United States vs. Johnston, 124 U. S. 236.

For example, in *United States v. Jones*, which involved the question as to the right of the accounting officers of the Treasury to disallow and charge against the officer a payment made to a naval officer by the Secretary of the Navy as an expense allowance. Referring to the Secretary of the Navy, this court said (18 How. p. 95):

> "His acts and decisions, *on subjects submitted to his jurisdiction and control by the constitution and laws*, do not require the approval of any officer of another department to make them valid and conclusive. *The accounting officers of the treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of the heads of departments.*"

In *United States v. Johnston*, the defendant was sued by the Government to recover the value of cotton which had come to his hands as a special agent of the Treasury Department in 1865. One of his defenses was that he had fully accounted for all his acts as such special agent and that his account had been approved by the Secretary of the Treasury and he had been fully released and discharged. There was a judgment for the defendant and the case was brought to this court on writ of error. It was held, first, that the entire administration of the system devised by Congress for the collection of captured and abandoned

property was committed to the Secretary of the Treasury by the act of 1864. The opinion then continued:

> "It is, however, contended that the words in the third section of the act of 1864, 'all accounts of moneys received or expended in connection therewith shall be audited by the proper accounting officers of the Treasury,' negative the supposition that those officers cannot disallow expenses incurred in the collection and sale of captured and abandoned property, which the Secretary may have approved as proper and necessary. By 'proper accounting officers of the Treasury' in that statute, it is contended, is meant the First Auditor and the First Comptroller. It is consequently argued that the settlement upon which the defendant relies constitutes no obstacle to the examintaion of the items of his accounts."
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> * * * * * * *
>
> "While there is much force in this view of the case, we do not deem it necessary to decide whether the accounts of defendant, in respect to the 483 bales of cotton, were required by the statute of 1864 to be audited by the First Auditor and transmitted to the First Comptroller for his decision thereon. *If the act of 1864 should be held to have required this, it would not follow that those officers could have disregarded the action of the Secretary of the Treasury in allowing the expenses in question. In auditing those accounts, they would have been bound to regard such action of the Secretary as final.* What was said in *United States v. Jones*, 18 How. 92, 96, may be repeated here, as applicable to accounts which have been finally acted upon by a head of department, invested with authority in the premises. There the question was as to the right of accounting officers to review the action of the Secretary of the Navy

> in approving certain disbursements made by an officer of the Navy in conformity with the orders of the Secretary. This court said: 'The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of heads of departments.' See *McKnight v. United States*, 13 C. Cl. 292, 298, 309."

How then can the Auditor here claim a right to revise the judgments and correct the supposed mistakes of the Collector from whose decisions the law expressly provides an appeal to the Court of First Instance?

The determination of the availability of the appropriation, the Auditor contends, is nothing more nor less than the duty and authority to determine whether the customs duties in question had been *erroneously* and *illegally* collected. That duty, however, is committed to the Collector of Customs and not to the Auditor. The court below has done nothing to change or disregard the rule. The court below has lent its aid, as it must, to carry out the determination and decision of the officer charged by law with the duty of determining that question and the right to refund.

Whatever may be the general powers of the Insular Auditor, or the accounting officers of the United States, in this particular case the Auditor does not have jurisdiction to determine whether the duties in question were erroneously or illegally collected, or, as he puts it in the alternative, whether the appropriation is available. So far as Philippine customs duties are concerned, this duty is specifically committed to the Collector of Customs. The history of the government accounting system in the United States has no bearing on the particular and limited question presented in

this case. The accounting officers, whatever may be their historical jurisdiction, are always subject to the will of the legislature which may at any time enlarge or reduce their powers. The Auditor, whose office is established by act of Congress, is always subject to the Congress. The legislative body which creates the office and fixes the powers and duties of the officer may impose limitations and may make exceptions. With respect to the question of the right to a refund of customs duties in the Philippine Islands, the Auditor has no power or discretion. That is a matter which *the legislative body* has seen fit to commit to the Collector of Customs.

In Point VII counsel for the Auditor come directly to the point when they say: "*The jurisdiction of the Collector to settle claims for refund of customs duties is subordinate to that of the Auditor.*"

The argument is that the Auditor has authority, derived from section 24 of the Organic Act, to "examine, audit and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine Government" and to "audit, in accordance with the laws and administrative regulations, all expenditures of funds;" that this includes, through practice and precedent, the duty to determine the availability of an appropriation for the payment of money; that, therefore, it is the duty of the Insular Auditor to determine the availability for customs refunds of the appropriation provided for that purpose by the Philippine legislature; that the appropriation cannot be said to be available except for refunds of duties *erroneously* and *illegally* collected; and therefore that it is his duty to determine whether the customs duties in question *were* erroneously and illegally collected, that is, *to decide for*

himself every customs refund case on its merits. The argument is directly contrary to the express provisions of the Tariff Act of 1909, which imposes on the Collector of Customs, with an appeal to the Court of First Instance, the duty of deciding whether customs duties are erroneously and illegally collected.

The mere fact that the law provides for appeals from the decisions of the Collector of Customs to the Court of First Instance must remove any doubt as to the *Auditor's* power to review such decisions. Appeals from the decisions of the Collector of Customs in such matters were first provided in 1902 by Act No. 355 of the Philippine Commission authorizing appeals to the Court of Customs Appeals. In 1905, by Act No. 1405, it was provided that the appeals should be to the Court of First Instance. These provisions are now carried in the Administrative Code 1917, sections 1383-1384.

If it had been intended to repeal all these provisions and likewise the express provisions of the Tariff Act of 1909, already quoted, that intention would have been expressed in the Organic Act of 1916. The general language of section 24 of the Organic Act conferring upon the Auditor jurisdiction to "examine, audit and settle all accounts" and to "audit, in accordance with laws and administrative regulations, all expenditures of funds," cannot be read as repealing the express provisions of law with respect to the jurisdiction of the Collector of Customs over customs matters, including refunds of duties erroneously and illegally collected, and the right of appeal to the courts.

The fallacy of the Auditor's contention that the jurisdiction of the Collector of Customs to settle claims for refund of customs duties is subordinate to that of

the Auditor, is further disclosed by a consideration of the effect of a decision by the Collector from which an appeal to the Court of First Instance is taken, and the claimed effect when no appeal is taken. The law provides that either the claimant or the Government may appeal to the Court of First Instance from an adverse decision by the Collector. Administrative Code 1917, sections 1383-1384. Counsel for the Auditor say in their brief, pp. 42-43, that if an appeal is taken to the Court of First Instance, either by the claimant or by the Government, the claim is transferred from the executive department to the judicial department and the Auditor "neither has nor claims any control. The decision of the court in such a case is a judgment not reviewable except by the Supreme Court, and payable out of the general and indefinite appropriation made by act No. 357 of the Philippine Commission." But counsel say that if *no* appeal is taken from the decision of the Collector then the Collector's decision "is reviewable by the auditor as are such decisions of the officers of all the executive branches." That is to say, the jurisdiction of the Auditor *is dependent entirely on whether or not an appeal is taken from the decision of the Collector to the Court of First Instance.* If the decision is in favor of the Government, the claimant may take his appeal and have his hearing in court. If the decision is *in favor of the claimant*, however, and the Government chooses not to appeal, the claimant will be denied his hearing in court. That is to say, the government may choose its tribunal, the court or the Auditor, by perfecting an appeal to the court, or not appealing, and the failure to take an appeal will *confer* jurisdiction on the Auditor. The absurdity of such a construction of the

law is plain. Yet, that is precisely the construction contended for by counsel for the Auditor, at pp. 42 and 43 of their brief.

We cannot regard the decision of the House of Lords in *Rex v. Roberts*, 1925 A. C. 578, as controlling here. There are important differences between that case and this case. In the English case a Board of Works had been granted power by the Metropolis Management Act, 1853, to appoint and remove certain classes of employees, and "may allow to such clerks, treasurers, surveyors, officers and servants, respectively, such salaries and wages as the Board * * * may think fit." By a later act, the Public Health Act, 1875, it was provided that the District Auditor "shall disallow every item of account contrary to law, and surcharge the same on the person making or authorizing the illegal payment. * * *"

The House of Lords, reversing the Court of Appeals, held that the duty of the District Auditor is not limited to determining whether there was bad faith on the part of the disbursing officer but is broadly to restrain expenditures within proper limits and to inquire if there is any excess over what is reasonable, and that he must use his own judgment as to what is reasonable under the circumstances, and to that extent he has authority to review decisions of the Board of Works with respect to the payment of salaries and wages.

The decision of the House of Lords and the several concurring opinions of the judges must be taken as resting on the provisions of law cited, s. 62 of the Metropolis Management Act, 1853, and s. 247, sub-s. 7 of the Public Health Act, 1875.

The important distinction between that case and

this case is that here we have a series of statutes, beginning with Act No. 355 of Philippine Commission in 1902, conferring upon and recognizing jurisdiction in the Collector of Customs to decide all customs matters, including customs refunds, and providing for appeals *to the courts* from the decisions of the Collector. The fact that the law provides for such appeals necessarily denies the jurisdiction of the Auditor to review such decisions. In *Rex v. Roberts* there was no provision of law for reviewing the decision of the Board of Works except by means of the audit by the District Auditor.

In Points IX and X counsel for the Auditor refer to the use of the words "account" and "audit" in section 24 of the Organic Act and the construction put upon those words by the court below. Undoubtedly, as used in the various acts of Congress cited in the brief of counsel for the Auditor, the word "account" is a general term which covers any item of indebtedness. It does not follow, however, that simply because the Auditor has jurisdiction generally to "examine, audit and settle all accounts" etc. and "to audit, in accordance with law and administrative regulations, all expenditure of funds" etc. such general provisions confer jurisdiction to review the decision of the Collector of Customs with respect to a customs refund, for the review of which specific provision was made. As we have already pointed out, the Auditor's argument is reduced to a contention that because of his *general* jurisdiction over accounts, and his duty to determine the availability of an appropriation, he has authority in this case to determine "whether the customs duties actually had been *erroneously* and *illegally* collected." The quotation, including the italics, is

from the brief of counsel for the Auditor, page 64. We submit this amounts to a contention that the Auditor has absolute power to decide for himself every customs refund case on its merits without regard to the decision of the Collector, and that such a contention is directly contrary to the law which imposes on the Collector of Customs, and, on appeal, the Court of First Instance, the duty and responsibility of deciding such matters.

We have been unable to find anything in the legislative history of the Organic Act, particularly section 24, which lends any support to the Auditor's theory of his powers. We have copied in an appendix hereto references to the reports of the committees and the debates in the Senate and House with respect to section 24.

In view of the express provisions of the Tariff Act of 1909 and the other legislation on this subject, beginning with the acts of the Philippine Commission in 1902, there is no ground for the Auditor's contention. If the system is wrong, from an accounting standpoint, the Auditor's remedy is an appeal to the Congress for legislation.

III.

The Right to Mandamus:

There could hardly be a plainer case for a writ of mandamus to compel a government officer to perform a ministerial act. In the face of every applicable statute, and notwithstanding a showing of meticulous compliance with every requirement of law, the Auditor has persisted in his refusal to countersign the warrant drawn by the Collector of Customs, solely on the ground that he is possessed of some transcendental

power of review over every other government officer in every matter which involves the payment of money. That he has no such power and that his duty to countersign the warrant *in this case* (whatever may be his authority generally) is no more than a ministerial duty, has already been pointed out.

The Supreme Court of the Philippine Islands found that the Auditor's duty was "confined and limited to an investigation of the primary and fundamental facts as to whether a protest was duly filed and a hearing was duly had upon the protest, and that the Collector of Customs had ordered the refund of the money in question, and whether there had been a compliance with all the legal formalities concerning the protest." (R 77.)

It is well settled that a government officer who refuses to perform a ministerial duty imposed by law may be compelled to do so by mandamus.

Commissioner v. Whiteley, 4 Wall. 522.
Lane v. Hoglund, 244 U. S. 174, and cases cited.

It is idle to say that the acts of the accounting officers of the United States, or the Insular Auditor, may not be controlled by mandamus or injunction. They are as much subject to the rule as other government officers. We argue for no larger jurisdiction in the Supreme Court of the Philippine Islands than in the courts of the United States. In such a case as this the courts of the United States would have jurisdiction to grant a writ of mandamus.

Smith v. Jackson, 246 U. S. 388.
McCarl v. Cox, 8 Fed. (2d) 669.
Mare v. Alexander, 2 Fed. (2d) 895, 5 Fed. (2d), 964.
Pence v. McCarl, 54 Wash. Law. Rep. 178.

The rule is the same in the Philippine Islands.

Hoey v. Baldwin—1 Phil. Rep. 551.
Lamb v. Phipps—22 " " 456.
Compania General de Tabacos v. French, 39 Phil. Rep. 34.
Zobel vs. City of Manila—XXXIII O. G. 411.

In *Hoey v. Baldwin*, 1 Phil. Rep. 551, the petitioner alleged that proper certificates showing that he was entitled to receive his salary had been filed with the defendant. It was held: "The only duty which the defendant had to perform in this case was to pay the money to the plaintiff. This was a duty purely ministerial, which the law specially enjoins as a duty resulting from his office."

In *Lamb v. Phipps*, 22 Phil. Rep. 456, the court was called upon to decide whether the Insular Auditor, in examining and settling an account and balancing items of debit and credit, was exercising a judicial discretion not controllable by mandamus. It was held that he was, but the court said:

> "Auditors and comptrollers, as accounting officers, are generally regarded as quasi-judicial officers. They perform *mere ministerial duties* only in cases *where the sum due is conclusively fixed by law* or pursuant to law. Except in such cases, the action of the accounting officers upon claims * * * is not ministerial merely but judicial and discretionary."

In *Zobel v. City of Manila*, XXXIII O. G. 411, recently decided, the Supreme Court of the Philippine Islands said:

"Another reason advanced for supposing the contract for the purchase of this property to be invalid, or at least unenforcible, is that the Insular Auditor has refused to countersign the warrant for the first installment of the purchase price; and it is insisted for the defendant that this action on his part is conclusive against the plaintiffs. Their sole recourse, so it is claimed, is, or rather was, by way of administrative appeal from the action of the Auditor to the Governor-General. The suggestion is in our opinion without merit. The general provisions of law defining the jurisdiction and powers of the Auditor and which, if literally construed, would seem to make him absolute arbiter of all claims of any sort against all branches of the government must be considered to be qualified as regards the contract rights of persons dealing with the city by the more specific provisions declaring how and by whom contracts can be made which will be binding on it. It was not intended that the Auditor should possess a general veto power over all city contracts, and his refusal to countersign the warrant referred to is of no moment in this action to enforce the legal liability of the city."

In the present case the respondent had no other remedy and no choice but to resort to mandamus.

It had no remedy by suit against the Philippine Government because there is no law authorizing such a suit.

Neither did it have any remedy by appeal to the Governor General, as suggested by counsel for the Insular Auditor. The provision in section 25 of the Organic Act, that any person aggrieved by the action or decision of the Insular Auditor in the settlement of an account or claim before the Auditor under section 24, may take an appeal to the Governor General and

to the Secretary of War, obviously refers to accounts and claims before the Insular Auditor which he is required to "examine, audit and settle" and which involve the exercise of a judicial discretion. His duty in this case, however, as hereinbefore shown, is limited to countersigning the warrant drawn by the Insular Collector of Customs (after satisfying himself that the Collector has rendered a decision in a case properly before him under the Tariff Act of 1909, and that the amount of the warrant is in accordance with the terms of that decision). The Auditor's duty in this case is plainly ministerial and does not involve the exercise of judicial power or discretion. The Auditor's refusal to act, therefore, can not be corrected by an appeal to the Governor General.

An appeal to the Governor General would necessarily admit that the Auditor had jurisdiction to review the decision of the Collector of Customs which is denied and which is the only issue in the case. If the Auditor has no such power and has nothing to do but to countersign the warrant drawn by the Collector of Customs (assuming a showing that all the requirements of law have been met), he is clearly subject to mandamus. If he has the power of review for which he contends, the respondent has no case. The only way to test the Auditor's power is by resort to the courts. In any event an appeal to the Governor General would be useless and improper because it would necessarily assume the very power which the Auditor insists he has and which the respondent denies.

In a similar case, *Campania General de Tabacos v. French*, 39 Phil. Rep. 34, the Supreme Court of the Philippine Islands has said:

"The failure to appeal from the Auditor's decision does not affect petitioner's right of redress in the courts.

"In considering the case before us, it is important to bear in mind that the Government is admittedly indebted to the petitioner in the definite and certain sum of ₱322.93. No action, either administrative or judicial, is therefore necessary to fix this liability upon the Government. In so far as legal liability can result from governmental activities, liability exists and upon the demurrer is admitted. Furthermore, said liability is such that it should be absolved by a warrant drawn by the Purchasing Agent and countersigned by the Insular Auditor. The law makes provision for the payment of the money in this way, and it cannot otherwise be gotten out of the Insular Treasury.

"The legal remedy here indicated as proper is the writ of mandamus to compel the Purchasing Agent and the Insular Auditor to issue, countersign, and deliver the proper warrant to the petitioner. (Hoey v. Baldwin, 1 Phil. Rep. 551.)

"The liability of these officers to the coercive process of mandamus arises from the fact that a valid claim exists for the payment of which provision has been made, that these officers are the appointed agents for making the payment, and that under these circumstances the execution and delivery to the creditor of the warrant are merely ministerial functions involving no discretionary action whatever."

Counsel for the Auditor in their brief, page 76, say: "This suit does not rest upon an abuse of power by the Auditor and the case of *Goltra v. Weeks*, decided June 7, 1926, by the Supreme Court of the United States, is not apropos." That is exactly where counsel for the Auditor miss the point. This case *does* rest

upon an abuse of power by the Auditor. We have argued from the beginning that the Auditor has no discretion whatever in such a case and no duty to perform but the ministerial duty of countersigning the warrant to carry into effect the decision of the Collector of Customs, made final by the failure of the Government to appeal as provided by law; that the Auditor has no power of review of that decision; that the respondent has no appeal from the Auditor's attempted exercise of power, because any attempted appeal to the Government would necessarily admit the jurisdiction of the Auditor which is the very thing we deny; and that confronted by the Auditor's usurpation of power and his arbitrary refusal to perform the ministerial duty imposed upon him by law, the respondent's only remedy is by writ of mandamus. The whole case is the abuse of power by the Auditor in his claimed jurisdiction to review the decision of the Collector of Customs. As before stated, if he has such power, the respondent has no case. If he has no such power, the respondent is clearly entitled to the writ as granted by the lower court.

Respectfully submitted,

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Counsel for Respondent.

APPENDIX.

The Act of August 29, 1916, 39 Stat. 545.

The bill was introduced in the Senate on December 7, 1915, as S. 381, 64th. Congress 1st. Session, and was referred to the Committee on the Philippines.

It was reported to the Senate on December 17, 1915, accompanied by Senate Report No. 18. The only reference in the report of the Committee to the provision for an auditor was as follows:

> "Heretofore an auditor has been appointed by the Secretary of War with full and independent control of the important work of auditing, checking up, and settling the accounts of public revenues and expenditures in the Philippine Islands. This has proven a very wholesome safeguard, and for that reason a similar provision is incorporated in the pending measure, except that the appointment shall be by the President."

In the debate in the Senate the only reference to the Auditor is found in Senator Hitchcock's statement in explanation of the bill as reported. He said:

> "The bill also provides that the auditor for the Philippine Islands shall be appointed by the President of the United States, and, to some extent, therefore, shall be an independent official and shall audit the accounts of the various departments of the government of the islands, the Philippine government, the provincial governments, and the municipal governments." Congressional Record, Vol. 53, p. 610.

In the House the bill was reported by the Committee on Insular Affairs, House Report 499, on April 6, 1916. In summarizing the features of the provisional Government the report stated:

> "Section 26 provides for the appointment by the President of an auditor, and defines the duties of that official. It also provides for the appointment in the same manner of a deputy auditor."

The conference report, Senate Document 530, in which was copied the bill as finally agreed upon, shows section 24 in the form in which it became law.

In the debate on the conference report in the Senate section 24 was referred to twice. Senator Hitchcock, in explaining the conference report, said:

> "The House conferees also conceded another amendment which the Senate incorporated in the bill, and that was that an auditor for the Islands for the Philippine government, for the provincial governments, and for the municipal governments should be appointed by the President of the United States; that he should have an assistant auditor; and that all the accounts of the Philippine government and its officials, the accounts of the municipal governments and of the provincial governments should pass through the hands of this auditor. This is for the purpose of insuring in the future what has been true of the past, a protection against the possibility of graft or the misappropriation of funds in the Islands." Congressional Record, Vol. 53, p. 12592.

Later in the debate he referred again to the auditor:

> "The Senate conferees found themselves under the necessity of accepting the House amendment, which was practically a substitute for the Senate bill, embracing 33 sections, and we were able, after several conferences with the House conferees, to induce them to accept four or five of the important amendments which I have already recited, and which go to vital matters, affecting the perpetuation of good government in the Islands. One of

those amendments related to the vice governor, another to the auditor, another to the electorate. Those were vital amendments which we were able to induce the House conferees to accept." Congressional Record, Vol. 53, p. 12594.

In the House in the debate on the conference report Mr. Jones referred to section 24 as follows:

"The Senate bill also provided for the appointment by the President of an auditor and a deputy auditor. The House bill contained no such provision. The conferees on the part of the Senate insisted that it was important that there should be an auditor and a deputy auditor to supervise the accounts of the Islands, and the House conferees yielded the point." Congressional Record, Vol. 53, p. 12836.